

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

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ALLAN N. WEISS,

Plaintiff,

v.

SAMUEL MASUCCI, III, ROBERT J.
SHILLER, LAWRENCE LARKIN,
MACROMARKETS, LLC and
MACRO SECURITIES DEPOSITOR, LLC,

Defendants.
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: 06 Civ. 6285 (DRD)

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: **AMENDED COMPLAINT**

: **JURY TRIAL DEMANDED**

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ALLAN N. WEISS, by his attorneys Saiber Schlesinger Satz & Goldstein LLC,
for his amended complaint alleges as follows:

PARTIES

1. Plaintiff Allan N. Weiss (“Weiss”) resides in Medfield, Massachusetts. Weiss is a founder and former Manager and Chief Executive Officer and Chairman of the Board of MacroMarkets LLC (“MacroMarkets”), and is one of the inventors of U.S. Patent No. 5,987,435 and U.S. Patent No. 6,513,020 (the “Macro® Securities Patents”), which represent a principal asset of MacroMarkets. Weiss, along with defendant Robert J. Shiller, is named as the inventor in each patent as issued.

2. Defendant Samuel Masucci, III (“Masucci”) resides in Morristown, New Jersey and is the current Chief Executive Officer and a Manager of MacroMarkets.

3. Defendant Robert J. Shiller (“Shiller”) resides in New Haven, Connecticut and is a Professor of Economics at Yale University in New Haven, Connecticut. Along with

Weiss, Shiller was the co-founder of MacroMarkets and the co-inventor of the Macro® Securities Patents. Shiller is Chief Economist and a Manager of MacroMarkets LLC.

4. Defendant Lawrence G. Larkin (“Larkin”) resides in Spring Lake, New Jersey and is a Managing Director and Manager of MacroMarkets LLC.

5. Defendant MacroMarkets is a limited liability company formed under the laws of Delaware with its principal place of business at 14 Main St, Suite 100, Madison, New Jersey.

6. Defendant Macro Securities Depositor LLC (“Macro Securities Depositor”) is a limited liability company formed under the laws of Delaware with its principal executive office at 73 Green Tree Drive #9, Dover, Delaware 19904. Macro Securities Depositor was originally a wholly-owned subsidiary of MacroMarkets and is currently 50% owned by MacroMarkets.

JURISDICTION AND VENUE

7. The Court has federal question subject matter jurisdiction of this action under Section 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B) and 28 U.S.C. § 1331.

8. Venue in this judicial district is proper under 28 U.S.C. § 1391 (b)(2) and (3).

Factual Background

9. **The Development of the Macro® Security.** Weiss first met Shiller in 1988 while Weiss was a graduate student at the Yale School of Organization and Management (“Yale SOM”) and Shiller was a professor in the Economics Department at Yale. Weiss visited Shiller in his office because Weiss had heard that Shiller and Karl Case, a professor at Wellesley College, had recently pioneered a new technique for indexing home prices, later known as the Case-Shiller index. Weiss was interested in such an

index because he wanted to undertake an independent project with two other graduate students to show whether home prices could be forecasted. While Shiller never taught Weiss in any class, and was not the official advisor for Weiss's independent research project, Shiller did become an informal advisor to Weiss and the two other SOM students who worked with Weiss on the research project.

10. Weiss graduated from the Yale SOM in 1989. In 1991 Weiss, Shiller and Karl Case formed Case Shiller Weiss, Inc. ("CSW") for the purpose of creating two new products: a futures market in single family homes, and home equity insurance, the latter intended to protect homeowners in the event that their homes declined in value due to market conditions. Weiss served as the President and CEO of CSW while Shiller and Case continued in their academic positions. Shiller adapted the Case-Shiller Index for the two new intended applications, which Weiss began producing and selling to investment banks, rating agencies and large lending institutions. Later, Weiss expanded the activities of CSW to include computerized appraisals for underwriting home equity and other mortgage loans. However the company did not achieve its goal of creating a futures market in single family home prices.

11. The concept of Macro® Securities, which he initially called proxy assets, first occurred to Weiss as he was considering that a company such as Exxon Corporation can have a swap with another company for oil prices, in which Exxon makes money if oil prices move in one direction and loses money if oil prices move in the other direction. An Exxon shareholder indirectly owns a proportional share of this oil price swap. Then Weiss realized that if there were two companies that held cash and agreed to swap cash back and forth according to an agreed index, and participated in no other businesses, a

shareholder in one of these companies would effectively own either a short or long position in a designated index. The shareholders would also receive interest income on their share of the cash. Weiss thought that this kind of company could be traded on an ordinary stock exchange as a way to make a liquid market in single family home prices.

12. Weiss described the idea to Shiller, who suggested that they apply for a patent on it. Along with Shiller, Weiss developed the invention underlying two United States patents for what became Macro® Securities. The first patent application was filed with the U.S. Patent Office on October 30, 1997, and was granted November 16, 1999 (Patent No. 5,987,435); and the second patent application was filed on September 29, 1999 and granted on January 28, 2003 (Patent Number 6,513,020). Each patent was entitled “Proxy Asset Data Processor.” Both patents identify Allan Weiss and Robert Shiller as the inventors. A subsequent patent application in the U.S. Patent Office, Application No. 10/087,339, entitled “Proxy Asset System and Method,” names Weiss as the sole inventor and further develops the prior two patents.

13. Weiss suggested re-branding their invention from Proxy Assets to Macro® Securities because of the marketing benefits of referencing an award-winning book, *Macro Markets*, that Shiller had written discussing the need for liquid markets for currently illiquid risks. Accordingly, Weiss and Shiller agreed to refer to the two patents underlying their design as “Macro® Security Patents” and the design itself as “Macro® Securities.”

14. A Macro® Security consists, in essence, of a pair of securities that trade separately on an exchange and whose values track a benchmark index or price, such as housing or crude oil. A Macro-Up and a Macro-Down Trust are funded at inception with

short-term U.S. Treasury obligations, and, depending on subsequent changes in the index, such obligations are moved between the two trusts to reflect changes in the benchmark index. Investors can buy shares in either the “Up” or the “Down” trust and receive the benefits or losses resulting from changes in these positions, as well as the interest income from the underlying U.S. Treasury securities held in the trusts. Macro® Securities allow an investor to hedge risks, or make an investment in the underlying index in a manner that is liquid and has little credit risk.

15. On or about May 26, 2004, Weiss and Shiller agreed that the following language addressing Weiss’s role would always be used in any description of the origin of Macro® Securities:

Allan Weiss conceived of the essential idea for macro securities, which he originally called proxy assets, and was co-developer of the patentable invention that underlies MACROs.

Shiller composed the language quoted above and sent it in an e-mail to Weiss and others.

16. **Formation and Development of MacroMarkets.** On or about November 17, 1999, MacroMarkets (originally called Macro Securities Research, LLC) was formed as a wholly-owned subsidiary of CSW for the purpose of exploiting the Macro® Security Patents. In 2002 FiServ, Inc. acquired CSW, but since MacroMarkets was not included in this sale, ownership of its voting equity was ultimately transferred to Shiller and Weiss, as inventors of the Macro® Security Patents. Weiss became the Chief Executive Officer of MacroMarkets at its inception in 1999.

17. Masucci was a broker at Merrill Lynch and an investment banker at UBS and Bear Stearns, where he marketed products such as shared appreciation mortgages. Masucci was recruited by Weiss and began working for MacroMarkets in 2001, first as a

consultant and later as its Chief Operating Officer. He reported to Weiss, then the Chief Executive Officer. As the Company's Chief Operating Officer, Masucci was expected to implement the Company's strategy as set by the Board of Managers, under Weiss's direction as CEO. Masucci hired Larkin, a former executive at the American Stock Exchange and partner at Goldman Sachs & Co., as a consultant to MacroMarkets on or about May 1, 2005.

18. MacroMarkets later formed Macro Securities Depositor, originally as a wholly-owned subsidiary, to serve as the registrant for the issuance of Macro® Securities.

19. On June 17, 2004, Macro Securities Depositor filed an initial Registration Statement with the Securities and Exchange Commission for the public offering of the first Macro® Securities. On June 29, 2006, MacroMarkets made an agreement with Claymore Securities, Inc. ("Claymore") pursuant to which Claymore became the 50% owner of Macro Securities Depositor and the first Macro® Securities were to be known as Claymore MACROshares, consisting of Claymore MACROshares Oil Up Tradeable Shares (the "Oil Up Macros") and Claymore MACROshares Oil Down Tradeable Shares (the "Oil Down Macros"). The Oil Up Macros are covered by Macro Securities Depositor's original S-1 Registration Statement, as amended, and the Oil Down Macros are covered by a subsequently filed S-1 Registration Statement of Macro Securities Depositor that essentially mirrors the Oil Up Registration Statement except as to the "up" and "down" characteristics of each security. The Registration Statements for the Oil Up and Oil Down Macros were amended several times, and were each declared effective by the Securities and Exchange Commission on November 30, 2006.

20. **Defendants' Campaign to Have Masucci Replace Weiss as CEO and Force Weiss Out of MacroMarkets.** Beginning in the summer of 2005, Masucci, Shiller and Larkin began a campaign to oust Weiss from MacroMarkets. After initially backing Weiss, Shiller, under threat of Larkin's resignation as a consultant to MacroMarkets, ultimately sided with Masucci, which led to Masucci becoming Chief Executive Officer on or about September 11, 2005, at which time Weiss became the Chairman of the Board of Managers. Weiss's claims regarding this and other issues are the subject of a separate arbitration proceeding before the American Arbitration Association. On April 15, 2006, Masucci and Shiller, who together owned a majority of the voting equity interests in MacroMarkets, removed Weiss from his positions as Chairman of the Board and as a Manager. Larkin became a Manager of MacroMarkets on or about April 15, 2006, and thereafter joined in the plans of Masucci and Shiller to deprive Weiss of credit for his role in the development of Macro® Securities.

21. **Weiss's New Business: Index Capital Advisors, LLC.** Weiss formed Index Capital Advisors, LLC ("Index Capital Advisors") in 2006 to exploit DriversSM, a patented investment structure invented by Weiss that unbundles systemic opportunity from the idiosyncratic risk of particular investments. Weiss is the Chief Executive Officer of Index Capital Advisors and is the sole holder of equity interests in the firm.

22. The success of Index Capital Advisors depends in large part on Weiss's track record as a creator of patented financial innovations with commercial application, and in particular on Weiss's role as Chief Executive Officer of MacroMarkets from 1999 through 2005, in having conceived of the essential concept of Macro® Securities, and being the co-designer of the invention underlying the Macro® Securities Patents.

23. **Defendants' False Advertising and Defamation of Weiss.** Shiller, Masucci and Larkin began a systematic campaign to shift credit for the development of Macro® Securities from being the shared effort of Weiss and Shiller, with Weiss having originated the essential idea, towards crediting Shiller as the sole inventor and to pad Masucci's résumé by attributing the role of CEO from 1999 to 2005 to Masucci (instead of Weiss, the actual CEO during that period), and with a false description of Masucci's role with MacroMarkets. Macro Securities Depositor's Registration Statement for the Up Oil Macro as originally filed inaccurately characterized Masucci's role with the company by describing him as a "founder" of MacroMarkets and its Chief Operating Officer since 1999, even though he had no position with MacroMarkets until 2001. However, the original Registration Statement accurately stated that "Mr. Weiss conceived of the essential idea for Macro securities, which he originally called 'proxy assets,' and was co-developer of the patentable invention that underlies MACROS." The Registration Statement as originally filed also accurately stated that Shiller "worked with Mr. Weiss to develop the MACROs (Proxy Assets) design and patent."

24. Beginning with Amendment No. 6 to the Up Oil Registration Statement, filed August 11, 2006, following Weiss's ouster as Chairman and Manager, Shiller's role was amended from having "worked with Mr. Weiss to develop the MACROs (Proxy Assets) design and patent" to being "instrumental in helping to develop the MACROs (Proxy Assets) design and patent" without mentioning Weiss at all. Amendment No. 6 also adds the name "Claymore" before the term "MacroShares." "Claymore MACROshares" are the first Macro® Securities to be publicly issued, and their debt to Weiss and to Shiller is acknowledged in associated Registration Statements through the fee to be paid to

MacroMarkets as owner of the patent rights for Macro® Securities, and in the Claymore MACROshares website which has multiple references to Macro® Securities and the Macro® Securities Patents.

25. Masucci, Shiller and Larkin each signed Amendment No. 6 and all subsequent amendments to Macro Securities Depositor's Registration Statement for Claymore MACROShares. Amendment No. 6 falsely stated that Masucci was "a founding member of MacroMarkets and since 1999 has been MacroMarkets' Chief Executive Officer." In fact, Masucci was not a founding member of MacroMarkets, and did not even begin working with the company until 2001. Masucci did not become MacroMarkets' Chief Executive Officer until 2005. The descriptions of Masucci's role with MacroMarkets were false and deceptive not only in their characterization of Masucci's role, but defamatory of Weiss in implicitly denying that Weiss had been Chief Executive Officer of MacroMarkets from its founding in 1999 until 2005.

26. When the Registration Statements for the Oil Up and Oil Down Macros were declared effective on November 30, 2006, a press release was issued by Claymore Securities and MacroMarkets providing in pertinent part:

MacroMarkets, LLC, and Claymore Securities, Inc. today launched Claymore MACROshares™, a new investment product structure that pairs two exchange-traded securities that track the upward or downward movement of an index or benchmark price.

* * *

Robert Shiller, Chief Economist for MacroMarkets is the architect of Claymore MACROshares and first addressed the concept in his 1996 book *Macro Markets: Creating Institutions for Managing Society's Largest Economic Risks*, winner of the Paul A. Samuelson Award awarded for outstanding scholarly writing on lifelong financial security. Shiller is also the author of the New York Times Bestseller *Irrational Exuberance*.

(Emphasis added.) The press release made no mention of Mr. Weiss whatsoever. Upon information and belief, Shiller, Masucci and Larkin reviewed and approved the language in the press release prior to its release. Several earlier amendments to Macro Securities' Depositor's Registration Statement on Form S-1 for Macro® Securities state that Shiller "worked with Weiss to develop the MACROs (Proxy Assets) design and patent." The description of Shiller as "*the architect* of Claymore MACROshares" (emphasis added) was false, deceptive and defamatory because, as Shiller had already acknowledged, Weiss had conceived of the essential idea of Macro® Securities and had worked with Shiller to develop the design and patent of Macro® Securities. Upon information and belief, Shiller, Larkin and Masucci knew of the false, deceptive and defamatory nature of the statements in the press release and in the Registration Statements for the Up Oil and Down Oil Macros. The press release was posted verbatim on many finance websites including Yahoo! Finance, where it remains to this day. Misstatements that Shiller was "the architect" for Macro® Securities, "designed the products," and was "the architect of the MacroShares concept" were circulated in news articles, certain of which were posted by Macro Securities Depositor on the Securities and Exchange Commission EDGAR website, including the transcript of a television interview by reporter Mark Haynes on a CNBC television broadcast of an interview with Shiller and Masucci, in which they both failed to correct Haynes' misstatement of Shiller's role with respect to the origin of Macro® Securities.

27. Shiller, following Weiss's ouster, has, for his own commercial gain, taken sole credit for the design of Macro® Securities after he had previously acknowledged that

Weiss conceived of the essential idea for Macro® Securities and was co-inventor of the patents underlying Macro® Securities.

28. By e-mail of December 4, 2006 to defendants' counsel Richard Kadlick, Esq. of Skadden Arps Slate Meagher & Flom, LLP, Weiss's counsel demanded a retraction and correction of the November 30, 2006 press release. No retraction or correction has been made.

29. Since the November 30 press release, and following the request for a retraction and correction, the false statements contained in the release have continued to circulate in various media, certain of which have included interviews with Shiller, Masucci, or both.

30. The false, deceptive and defamatory statements made in the Up Oil Macro and Down Oil Macro Registration Statements, and in the November 30 press release, have damaged and are likely to continue to damage Weiss by making it appear that he was not the Chief Executive Officer of MacroMarkets from 1999 through 2005; that Weiss did not conceive of the essential idea of Macro® Securities; that Weiss is not the co-inventor of the invention underlying the Macro® Securities Patents, and that Weiss's statements to the contrary are untrue. Upon information and belief, defendants' false, deceptive and defamatory statements have damaged and continue to damage Weiss's reputation as an innovator of patented financial products and the business prospects of Weiss's firm Index Capital Advisors, and the remainder of Weiss's career.

Count I – Lanham Act: False and Deceptive Advertising

31. Weiss repeats and realleges each of the allegations in paragraphs 1 through 30 above as if fully set forth herein.

32. By reason of the foregoing, defendants have misrepresented in commercial advertising and promotion the nature, characteristics and qualities of the goods, services and commercial activities of Weiss, Shiller, MacroMarkets and Macro Securities Depositor, in violation of 43(a)(1)(B) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B).

Count II – New Jersey Fair Trade Act

33. Weiss repeats and realleges each of the allegations in paragraphs 1 through 30 above as if fully set forth herein.

34. By reason of the foregoing, defendants have violated the New Jersey Fair Trade Act, N.J.S.A. 56:4-1 *et seq.*

Count III – New Jersey Consumer Fraud Act

35. Weiss repeats and realleges each of the allegations in paragraphs 1 through 30 above as if fully set forth herein.

36. By reason of the foregoing, defendants have violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et seq.*

Count IV – Common Law Unfair Competition

37. Weiss repeats and realleges each of the allegations in paragraphs 1 through 30 above as if fully set forth herein.

38. By reason of the foregoing, defendants have engaged in unfair competition in violation of common law, to the detriment of Weiss.

Count IV – Defamation

39. Weiss repeats and realleges each of the allegations in paragraphs 1 through 30 above as if fully set forth herein.

40. By reason of the foregoing, defendants have defamed Weiss's character, business abilities, and abilities as an inventor and implementer of innovative financial products.

Relief Requested

WHEREFORE, Weiss demands judgment:

(a) awarding compensatory, trebled and punitive damages in favor of Weiss and against each of the defendants jointly and severally in an amount to be proved at trial;

(b) granting a permanent injunction requiring that defendants:

(i) retract and correct each false, deceptive and defamatory statement concerning Weiss's role as Chief Executive Officer of MacroMarkets and the invention and development of Macro® Securities, including but not limited to the issuance of a corrective press release through the same channels through which the November 30, 2006 press release was issued, as well as correction of the Registration Statements for the Up Oil Macros and Down Oil Macros, in which Allan Weiss is acknowledged a co-founder of MacroMarkets and identifying him as Chief Executive Officer of MacroMarkets from 1999 to 2005, and in which Weiss is acknowledged as having conceived of the essential idea of Macro® Securities and having co-invented its underlying patents; and

(ii) in all instances in which the origins of MacroMarkets is addressed in any press release, interview or other communications by or on behalf of MacroMarkets or Macro Securities Depositor (including, without limitation, periodic filings under the Securities and Exchange Act of 1934), acknowledge that Allan Weiss is a co-founder of MacroMarkets and identify Weiss as the Chief Executive Officer of MacroMarkets from 1999 to 2005; and

(iii) in any description of the origin of Macro® Securities or derivative products, describe Weiss as having conceived of the essential idea of Macro® Securities and as a co-inventor of the Macro® Securities Patents; and

(c) awarding counsel fees in favor of Weiss, together with costs.

DEMAND FOR JURY TRIAL

Plaintiff demands a trial by jury of all issues so triable.

Dated: January 4, 2007

**SAIBER SCHLESINGER SATZ
& GOLDSTEIN, LLC**

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